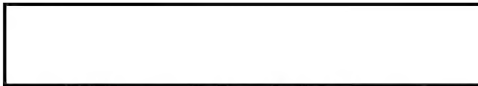


UNITED STATES
ATOMIC ENERGY COMMISSION
WASHINGTON 25, D.C.

January 10, 1968

STAT



Office of Legislative Counsel
Central Intelligence Agency
Washington, D. C. 20505

STAT

Dear 

As you requested, I am enclosing a copy of AEC's letter of May 16, 1967, to Senator Ervin on S. 1035.

Sincerely yours,

A handwritten signature in cursive script that reads "Charles Bechhoefer".

Charles Bechhoefer, Attorney
Office of the General Counsel

Attachment:
As stated above



UNITED STATES
ATOMIC ENERGY COMMISSION
WASHINGTON, D.C. 20545

MAY 16 1967

Dear Senator Ervin:

Thank you for your letter of March 16, 1967, requesting a report on S. 1035, a bill "[t]o protect the civilian employees of the executive branch of the United States Government in the enjoyment of their constitutional rights and to prevent unwarranted governmental invasions of their privacy", and enclosing a memorandum summarizing the differences between S. 1035 and S. 3779 of the 89th Congress. Your letter asks that we bring up to date our earlier report on S. 3779 and, in the light of the changes from S. 3779, submit any comments we may wish to offer on S. 1035.

You may recall that in our letter of February 15, 1967, on S. 3779, we pointed out that we are in full accord with the desire to avoid infringement of the constitutional rights of government employees, and to prevent unwarranted governmental invasion of their privacy. We found, however, that the broad criminal prohibitions of the bill would compromise the ability of the Commission's officers to carry out our programmatic mission, particularly with respect to our security program and our statutory responsibilities for safeguarding classified information. We therefore were unable to recommend passage of S. 3779.

We regret that we are also unable to recommend the adoption of S. 1035 in its present form. We believe that the bill is inconsistent with the conduct of an effective security program and, in addition, with the exercise of managerial efforts to create an environment which will further not only the programmatic needs of the Federal Government but the best interests of employees.

Management in the Federal service is traditionally oriented to deal fairly and openly with employees, from whose ranks it is most often drawn. We believe that a punitive statute such as S. 1035 would inevitably be regarded as evidence that Congress mistrusts the integrity and ability of management in the Federal service. The bill as written would attack not only certain deviations from proper practice which have been found to occur in relatively few places in the Federal service, but

Honorable Sam J. Ervin, Jr. . - 2 -

MAY 16 1967

the entire personnel and management structure of the Federal Government as well. It would thus tend to make a career in the Federal Government less attractive.

We are also opposed to the bill because it proscribes under criminal penalties, sometimes in very general terms, actions which may be undertaken in the best of faith for the protection or advancement of the interests of the Government and without any collateral illicit or sinister purpose. Moreover, it provides both judicial and quasi-judicial remedies, in addition to existing remedies, to review charges of unlawful actions which may be brought by employees and to determine and administer sanctions, when such ends may be effectively achieved by administrative action.

We believe that an approach to the problems which may exist should be a positive one of education and indoctrination to prevent alleged abuses, rather than the imposition of a statutory list of unlawful actions enforced by fear of criminal punishment. We would respond favorably to Congressional action which would express concern about supervisory actions which tend to invade Federal employees' privacy, set certain goals, and required the President to establish regulations to accomplish the stated goals.

If the Congress, however, should determine that a bill such as S. 1035 is desirable, we recommend a number of substantial changes in the bill submitted for review. The attached Appendix refers to the differences between S. 3779 and S. 1035, to the extent that they are significant from the point of view of the Commission's program, and discusses the changes we recommend.

The Appendix explains in greater detail why we believe that S. 1035 in its present form would seriously compromise our ability to meet our statutory obligations, and the nation's needs, for safeguarding classified information and thereby the common defense and security. As we pointed out in our letter on S. 3779, in carrying out our security program the Commission has been particularly diligent in protecting the right of an individual to a fair hearing in a security case, including the right to counsel and, consistent with necessary security limitations, the right to confrontation and cross-examination of adverse witnesses. The Commission must nevertheless be equipped with the tools to provide for an effective security program, and the Appendix shows how S. 1035 is inconsistent with the public interest in that regard.

- 3 -

MAY 16 1967

The Appendix also describes the serious administrative difficulties presented by the administrative remedies sanctioned by S. 1035. We have offered some pertinent suggestions which may be useful.

The Bureau of the Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

15/ Glenn T. Seaborg

Chairman

Honorable Sam J. Ervin, Jr.
Chairman
Subcommittee on Constitutional Rights
Committee on the Judiciary
United States Senate

Enclosure:
Appendix

Distribution:
Chairman (2)
GM (2)
DCM
AGM
AGMA
Asst to GM
OCR (2)
OC
PER
S
REG
LOGC (Kingsley)

100 Kingsley	PER	S	OCR	ASST TO GM	AGMA	
4/14/67	4/14/67	4/14/67	4/14/67	4/14/67	4/14/67	4/14/67
OFFICE	CC	CC	CC	EAGM	DCM	GM
SURNAME	Bechhoefer:lk	Rowden	Parks			
DATE	4/14/67	4/14/67	4/14/67	4/14/67	4/14/67	4/14/67

APPENDIX

I. Provisions having potential effects on the Commission's security and personnel programs.

1. Subsection 1(a) would declare it to be unlawful for any officer of any executive department or agency, or any person acting under his authority, to require or request any employee or an applicant for employment to disclose his race, religion or national origin, or that of his forebears. An exception is set forth for inquiry concerning the citizenship of any employee or applicant "if his citizenship is a statutory condition of his obtaining or retaining his employment."

This subsection appears to be designed to promote equal employment opportunity by prohibiting questioning relating to an employee's ethnic background, but it could be construed also to preclude questioning concerning an employee's date and place of birth and citizenship. For this reason, we object to the subsection. This latter type of information is an essential part of the investigation and report to the Commission on the "character, associations, and loyalty" of an individual which is required by Section 145 of the Atomic Energy Act of 1954, as amended, to be undertaken as part of our security program. The proviso would be of no use to this agency, since the citizenship of a person is not a statutory condition of his obtaining or retaining employment with the Atomic Energy Commission. We therefore recommend that this subsection at least be made inapplicable to national security matters.

2. Subsection 1(b) would declare it to be unlawful for any officer of an executive department or agency, or any person acting under his authority, to state or intimate that notice will be taken of an employee's "attendance or lack or [sic] attendance at any assemblage, discussion, or lecture", held or called by either a Government officer or by any outside parties or organizations, to "advise, instruct, or indoctrinate" any employee in anything other than the performance of assigned official duties or the development of skills, knowledge or abilities which qualify him for the performance of such duties. The subsection

- 2 -

explicitly sanctions taking notice of an employee's participation in the activities of any professional group or association.

This subsection, which is derived from subsections 1(b) and 1(c) of S. 3779, appears to condemn taking notice of an employee's attendance or lack of attendance at meetings, rather than holding such meetings. In addition, it appears to permit "taking notice" of an employee's outside professional activities. In these respects, the subsection alleviates certain deficiencies of the previous bill which, as we pointed out, were likely to operate to an employee's detriment. But by doing so the subsection, as well as subsections 1(c) and 1(d), would require a supervisor, under threat of criminal penalty, to determine whether or not a particular activity involves an employee's official duties or the development of skills, knowledge, or abilities which would qualify him for the performance of official duties, a matter of opinion about which reasonable men might differ widely in many cases. Moreover, this subsection is still so broad that it prevents activities which may be required in the interest of the common defense and security. Thus it would apparently be a misdemeanor to tell an employee, or attempt to state or intimate to him, that his attendance at a meeting of the Communist Party, or the Mafia, would be noted.

We suggest an exemption for national security matters, applicable to the entire bill. Alternatively, we suggest, as a minimum for this subsection, that an additional proviso be added, using language already appearing in subsection 1(d), as follows:

"Provided further, That nothing in this subsection shall be construed to prohibit taking notice of the participation of a civilian employee in activities which may be in conflict with his official duties."

3. Subsection 1(d). This subsection, derived from § 1(e) of S.3779, prohibits requiring or requesting an employee to make a report concerning activities not related to the performance of official duties or the development of skills, knowledge, or abilities which qualify him for the performance of such duties, "unless there is reason to believe that the civilian employee is engaged in outside activities or employment in conflict with

- 3 -

his official duties". This last clause was not present in S. 3779. We construe it to allow an agency to require reports of activities of employees which may be inconsistent with the common defense and security, as well as the appropriate performance of official duties, and as so construed we believe that it tends to meet the security objections to the subsection which we voiced in our previous letter.

4. Subsections 1(f) and 1(g). Subsection 1(f) would declare it to be unlawful to require or request an employee or an applicant for employment to submit to any interrogation or to take any psychological test to elicit information concerning "his personal relationship with any person connected with him by blood or marriage, or concerning his religious beliefs or practices, or concerning his attitude or conduct with respect to sexual matters". An exception is made for questioning "in individual cases" in order to enable a "psychiatrist" to determine "whether or not [an] individual is suffering from mental illness". Subsection 1(g) includes a similar prohibition, but with no exceptions, for polygraph examinations.

Both of these subsections are derived from subsection 1(g) of S. 3779. Our letter of February 15, 1967 pointed out that this subsection was inconsistent with our security regulations and procedures, which have been adopted to implement the statutory requirement that the Commission determine that permitting an individual to have access to Restricted Data "will not endanger the common defense and security" (42 U.S.C. 2165). We reported that the AEC has found that conduct comprehended by any category of derogatory information set forth in 10 CFR Part 10 may endanger the common defense and security, or may not be clearly consistent with the national interest, and must be taken into account in determining whether an individual shall be granted access to classified information. We pointed out that the categories include, among others, cases in which the individual has a mental illness, has been convicted of certain crimes or has been engaged in criminal activities, is a user of certain drugs, has abused trust or been dishonest or engaged in infamous, immoral or notoriously disgraceful conduct, is a sexual pervert or homosexual, or is a user of alcohol habitually and to excess; and cases where he or his spouse has held membership in certain subversive organizations, or associated with such members, or has specified relatives residing in a nation whose interests

- 4 -

may be inimical to the interests of the United States (10 CFR § 10.11). We also described the role of the interview in our investigative process, and how it is used to protect the individual as well as national security, since it provides a convenient forum for an employee or applicant to explain reported information. Since, without an interview, formal hearing procedures would be necessary in every case, we concluded that the provision in S. 3779 prohibiting the specified types of inquiry was inconsistent both with protecting the employee or applicant and with enabling us to make informed security decisions.

S. 1035 differs from S. 3779 in this respect mainly by including an exception for questioning by a psychiatrist in the case of "mental illness". That, of course, is one of the categories of derogatory information set forth in our regulations (see 10 CFR § 10.11(a)(7)). But we think that the exception is too narrow to be adequate from a security standpoint. We believe that questioning with respect to mental illness can appropriately be conducted not only by a psychiatrist but also by other professionals, such as clinical psychologists, who are qualified and frequently used in order to determine whether an individual is suffering from mental illness. Moreover, the subsection still would preclude questioning on such matters as reported participation in criminal activities, use of certain drugs, sexual perversion, alcoholism, subversive activities or associations, the residence of relatives in an iron-curtain country, or many other categories of information covered by our security regulations, except to the limited extent that they might be brought under the umbrella of "mental illness". If information on these matters were received, and if mental illness were not involved, we would be required by the terms of the proposed statute to initiate board hearings in every single case where such information was received; we could not even inquire of the individual whether the reported information correctly related to him.

For these reasons, we believe that S. 1035 would seriously circumscribe the effective conduct of our security program. We strongly recommend, as we have previously, that the bill provide a general exemption for matters pertaining to national security. Alternatively, we recommend that subsection 1(f) provide an exception for questioning which is required in the interest of safeguarding the common defense and security.

This subsection could be construed (depending on the meaning attributed to the words "has personal relationship") to make

- 5 -

it unlawful for personnel officers and selecting officials to require or request that applicants answer questions designed to elicit information concerning relatives who work for the Government. Without this information, an agency could not administer anti-nepotism policies, or the current policy that children of Government employees may not be employed in temporary summer appointments in the agency in which their parents serve. We recommend in this regard that subsection 1(f) also provide an exception for questions normally asked on employment applications as to the identification and residence of certain close relatives.

The use of polygraphs would be prohibited by subsection 1(g). The AEC does not use polygraphs except with the consent of the individual who is to be the subject. Some persons have requested polygraph examinations in connection with their security clearances. Although we would have no objection to subsection 1(g), we recommend that it be clarified to allow the use of the polygraph with the consent of the subject.

II. Administrative provisions.

Section 6 of S. 1035 would establish a "Board on Employees' Rights" with powers designed to enable it to prevent violations of various provisions of the Act. This Board had no counterpart in S. 3779, and the remedies which it would provide are in addition to the criminal and civil judicial sanctions proposed in S. 3779 and repeated without substantial change in S. 1035.

The Board would consist of three members appointed by the President, with the advice and consent of the Senate. No member "shall be an officer or employee of the United States Government". It would have power to investigate complaints, hold hearings, and make decisions with respect to violations of the Act. If it found that a violation has occurred, it would be required to issue a cease and desist order against the offending officer or employee, and to endeavor to eliminate an unlawful act or practice by informal methods of conference, conciliation, and persuasion. The Board would also be empowered, in its discretion, to issue an official reprimand, or to order the suspension without pay or removal of an officer or employee found by it to have violated the Act. (Special provisions are included for dealing with Presidential appointees and officers of the Armed Forces.) The bill would provide for review of a Board

- 6 -

determination or order in the United States District Courts.

Our letter on S. 3779 strongly objected to the criminal enforcement provisions of that bill. We find that the criminal provisions of this bill are equally objectionable, despite the lesser penalties. We continue to believe that criminal sanctions are inappropriate for dealing with the type of activity covered by the bill. Their only result can be the intimidation of officers and employees of the Government in the conduct of their official duties, without compensating benefit to the public interest.

The proposed Board is preferable as a means of enforcement, but as it would be established by S. 1035 it can only serve as a vehicle for obstruction and delay, since it merely adds other means for challenging agency action. If S. 1035 in its present form were enacted, an employee could in many cases use any one, several, or all of the following methods of redressing an alleged grievance:

1. action before the Board, either by the employee himself or by another party (which may be an employee organization) acting on his behalf, with appeal to the United States District Courts;
2. agency grievance procedures, with later judicial review;
3. agency discrimination procedures, with review by Civil Service Commission, when an action prohibited also constitutes discrimination;
4. suit in a United States District Court under Section 5 of S. 1035, for injunctive relief (without regard to whether administrative remedies have been exhausted);
5. action in the District Court for an injunction, brought by an employee organization with the consent and on behalf of, but not as legal representative of, the aggrieved employee; and
6. complaint to a United States Attorney to enforce criminal penalties.

- 7 -

We believe that this situation would allow an employee or an employee organization to use the Act or the Board as a tool for obstructionism, which we do not believe to be in the best interests either of the agencies or of employees with legitimate grievances. S. 1035 does not even provide a statute of limitations with respect to the commencement of a proceeding before the Board. We offer the following recommendations:

1. The proposed criminal penalties should be deleted.
2. The employee or applicant should be required first to seek adjustment of a complaint within his own agency. If such attempted adjustment is unsuccessful, the employee or applicant should be limited in seeking redress of his grievance to one method; or, in the alternative, should be required to choose between Board review and review under agency grievance procedures (comparable to the procedures offered to adverse action appellants by many agencies). A time limit within which actions must be filed with the Board should be spelled out in the Act, either in terms of a specified time limit or in terms of the time limit provided under agency grievance procedures.
3. Judicial review should be permitted only after final Board or agency decision, under standards normally accorded to review of such decisions. Section 5 of the bill should therefore be deleted.
4. Participation by an employee organization in any proceeding should be limited to appearance as representative of the aggrieved individual. An organization should not be permitted to file a complaint on behalf of an individual who does not feel strongly enough about the matter to file one himself.
5. If a Board is set up, we also recommend that the remedies which it can provide be limited to a cease and desist order, and methods of conference, conciliation, and persuasion, as provided by §§ 6(a)(1) and (2). The disciplinary remedies provided by § 6(a)(3) are appropriate for exercise only by an employing agency. Moreover, the powers provided to the Board may be inconsistent with appeal rights which employees now have under terms of the Veterans' Preference Act and other

- 8 -

statutes and equivalent agency regulations. Thus, there is no requirement concerning minimum notice afforded a person accused of violating the Act, or that the Board grant an oral hearing. See Section 6(h). We recommend that the Board be empowered to require an agency to take appropriate disciplinary action against an employee found by the Board to have violated the Act, but that disciplinary powers against individual employees be reserved to the agencies themselves and not be granted to the Board.

III. Other matters.

1. Subsections 1(c), and 1(l). Our comments on the comparable sections of S. 3779 (§§ 1(d), and 1(k), respectively) are equally applicable to S. 1035. For the convenience of the Committee, we respectfully repeat them in the following paragraphs, identifying the subsections as renumbered.

§ 1(c). This subsection may be construed to apply to such activities as charity campaigns, blood donor campaigns, and bond drives. We note that it is not limited in scope, as is subsection 1(i), to allow activities which doubtless all would approve.

§ 1(l). Under the literal language of this subsection, it would appear that the bill would operate to restrict a supervisor's authority to inquire into the performance of his subordinates, and thus significantly impede the conduct of the business of agencies. Grievance and appeal procedures are of course available to Federal employees. The Commission's regulations provide that within the scope of such proceedings an employee may be represented by counsel or other representative, and we would have no objection to appropriate amendment of the language of the bill to limit its operation accordingly. We should point out that, under the language of this subsection, the conduct of legitimate informal investigations of the activities of Government personnel, sometimes conducted under conditions of confidence, might be impeded. We would have no objection to a provision that an employee must be permitted, at his request, to have legal counsel of his own choice present when he is questioned in such an investigation, but we do not believe that laymen would be qualified to

- 9 -

protect his rights adequately or that his representation by laymen in an informal investigation would be adequate to protect the employee's interests. We believe that our position is consistent with even a very liberal interpretation of the doctrine of Miranda v. Arizona, 384 U.S. 436 (1966).

2. Subsections 1(j) and 1(k). Subsection 1(j) makes it unlawful to require or request an employee to disclose his financial affairs (except for employees having authority to make a final determination on tax or other liability to the United States, or on claims which require expenditure of moneys of the United States). Subsection 1(k) limits the disclosures permitted by subsection 1(j) to "specific items tending to indicate a conflict of interest in respect to the performance of . . . official duties" Subsection 1(j) is substantially similar to subsection 1(j) of S. 3779, whereas subsection 1(k) of S. 1035 is a new provision.

Subsection 1(j), by its exception proviso, recognizes the necessity or desirability of requiring some employees to disclose certain of their assets and liabilities, but the proviso applies to no one other than employees who have authority to make a final determination on tax or other liability to the United States or on claims which require expenditure of moneys of the United States. While we agree that the disclosure requirement calls for care in its application, it is our opinion that the disclosure proviso in subsection 1(j) is too inflexibly and narrowly drawn in that it may not cover persons occupying positions of greater sensitivity from a conflict-of-interest standpoint than those encompassed by the proviso. We believe that a proper selection of employees required to file financial interest statements requires a detailed knowledge of employee functions and responsibilities and the relationship thereof to possible conflicting private interests. For this reason, we urge that any legislation on this subject should be sufficiently broad to permit the exercise of some agency discretion.

We believe that the prohibitions of subsection 1(j) may also have implications for our security program; we refer to our

- 10 -

comments on subsection 1(f) for a discussion of this subject.

Subsection 1(k) limits the disclosures allowed under the subsection 1(j) proviso to those specific items "tending to indicate a conflict of interest". The type of information which would fall outside the proviso's scope is unclear to us. Assuming that this provision is intended to exclude from the reporting requirements such items as bank accounts, credit union shares, and debts for current and ordinary household and living expenses, it is consistent with our current regulations. In line with our comments above, however, we suggest that instead of the quoted limitation on reportable items, an agency be permitted to require reporting of such financial information as it determines to be relevant from a conflict-of-interest standpoint in the light of the duties and responsibilities of the employees concerned.

TRANSMITTAL SLIP		DATE
TO: <i>Mr Warner</i>		<i>1/15/68</i>
ROOM NO.	BUILDING <i>S 1035</i>	
REMARKS: <i>Attached is a copy of the AEC letter and Appendix on S 1035. We had the letter before but not the Appendix. I have marked some interesting points.</i>		
F		
RC		
FORM NO. 241 1 FEB 55 REPLACES FORM 36-8 WHICH MAY BE USED. <i>119-5521 (47)</i>		

STAT

STAT